Supreme Court, U.S.
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No. 92-805

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TIMOTHY A. DeWITT, ET AL.,
APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OPPOSING APPELLEES' MOTIONS TO AFFIRM

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QUESTIONS PRESENTED

In this case officers of the state and federal governments attempt to compel the sovereign people of California to select their federal congressional delegation through a racially segregative districting plan formulated by unelected members of the California Supreme Court. The questions presented by this case are:

1. Whether the federal government has power substantively to apportion federal Representatives within, as opposed to among, the sovereign States.

2. Whether the California Supreme Court is "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution (art. I, sec. 4).

3. Whether the Fourteenth Amendment's prohibition against "separate but equal" laws which has been applied, among other things, to public schools, beaches, and golf courses, also applies to congressional election districts.

4. Whether requiring federal voters to vote in district contests in which as many as six to seven times (600% to 700%) as many voters vote in some suburban and rural districts compared to other, urban districts violates the constitutional requirement of "one person, one vote."

5. Whether congressional voters and candidates qualified directly in and by the federal Constitution (Art. I, sec. 2, cls. 1 & 2) may be permitted, or required, by federal law (2 U.S.C. 2c) simultaneously to participate in contests

selecting fully 100% of the congressional delegations in, for example, the small States of Alaska and Wyoming, but less than 2% of the delegation for the sovereign, large State of California.

6. Whether federal Congress may mandate that State legislatures and the sovereign people of the States (or state and federal courts) affirmatively draw or establish congressional districts.

7. Whether Framers considered intra-state territorial residency restrictions to be "fundamental" to the American political system, and even assuming they did, whether their failure to express or incorporate this belief in the new, written Constitution demonstrates that they intended such restrictions to be subject to ordinary Constitutional review.

8. Whether minority voting groups of all types (e.g., racial minority groups, or the minority Republican political party) must have the opportunity to elect Members of the U.S. House of Representatives in numbers proportionate to their actual voting strength in the sovereign States.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-37), is not yet reported.

JURISDICTION

The judgment of the three-judge

district court was filed on August 31, 1992. The notice of direct appeal (J.S. App. 38-39) was filed on September 11, 1992. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

The Plaintiff-Appellants in this case are qualified and registered federal voters from California and Virginia, respectively, who desire to vote in congressional contests in their States outside the one single-member district in which they reside.

Appellants desire to associate in their State's congressional elections with like-minded voters and candidates to promote common ideas and interests, and to elect candidates of their choice to Congress.[1]

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[1] Please note again that, contrary to the district court's (and now the Appellees') apparent assumption, the Virginia Appellant here,

ARGUMENT

A. APPELLEES FAIL EVEN TO ADDRESS SEVERAL LEAD CONSTITUTIONAL QUESTIONS RAISED BY THIS CASE

1. Appellees Fail to Address Leading *Brown v. Board of Education*, Anti-Segregation Claim.

As Justice Mosk noted in dissent in Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992), the special masters appointed to formulate the State's new districting plan admitted in their final report that one of their primary objectives was to separate members of California's federal electorate on the basis of race and ethnicity. 1 Cal.4th, at 733.

Justice Mosk even went so far as to suggest that the proposed plan imposed impermissible racial and ethnic "quotas."

Rene A. Rivas, has no interest in voting in California's congressional elections.

Id. (citing Bakke v. Regents of University of California, 18 Cal.3d 34 (1976); University of California Regents v. Bakke, 438 U.S. 265 (1978)).

Appellants here, however, allege simply that allocating voters among mutually exclusive election districts on the basis of race and ethnicity violates the Fourteenth (and presumably Fifteenth) Amendment's proscription against racially segregative, or "separate but equal," laws. See Brown v. Board of Education, 347 U.S. 483 (1954).

The district court, for its part, erred badly in dismissing this claim in the first place. The court below concluded, in essence, that the special masters' subjective desire to comply with the federal Voting Rights Act, 42 U.S.C. 1973(a) & (b), as construed by this Court

in Thornburg v. Gingles, 478 U.S. 30 (1986), was sufficient in itself to justify Constitutional injuries resulting from the intentional physical separation of voters and candidates on the basis of race or ethnicity. See J.S. App., at 32-35. The district court's holding here simply must be wrong, however.

Congress enacted the Voting Rights Act under authority of the Enabling Clauses of the Fourteenth and Fifteenth Amendments. While the Enabling Clauses do confer broad enforcement powers on Congress, it should nonetheless be plain that Congress is not authorized by these clauses affirmatively to violate the substantive clauses of those same amendments. The district court's idea below that the special masters' new purposefully racially segregative plan

for California is somehow justified by virtue of this Court's construction of the federal Voting Rights Act in Gingles is therefore simply palpably erroneous.

The district court's summary dismissal of Appellants' anti-segregation claim in this case must be reversed.

2. Appellees' Failure to Address Appellants' Candidate Qualifications and Apportionment Clause Claims Fatally Undermines Analysis Proposed for Voter Qualifications Claim.

Appellees also fail even to address Appellants' claims based on the Candidate Qualifications and Apportionment Clauses, respectively, of the U.S. Constitution. Art. I, § 2, cls. 2 & 3.

Like its attempt to impose the direct federal income tax struck down in Pollock v. Farmers' Loan & Trust Co., 157

U.S. 429 (1895), Congress' effort here to apportion or allocate federal Representatives within, as opposed to among, the sovereign States violates the plain terms of the Apportionment Clause of the U.S. Constitution. Art. I, § 2, cl. 3.

Small-state members in the U.S. Senate join with self-interested, incumbent members of the U.S. House of Representatives to promote their respective, but equally illegitimate, goals. Small-state Senators seek to impose a disproportionate burden on the electorates of large states in promoting and protecting their interests in the House of Representatives. See, e.g., Remarks of Sen. Crittenden of Kentucky, Cong. Globe, 27th Cong., 2d Sess., at 457-58 (App. 1842). House incumbents,

for their part, seek simply to avoid difficult re-election contests against fellow incumbent members of their respective State congressional delegations. See J.S., at 61-62.

These self-interested federal legislators achieve the desired illegitimate "apportionment" of federal Representatives within, as opposed to among, the States, however, precisely by imposing independently illegitimate district-based, sub- or intra-state territorial residency qualifications on all congressional candidates. These restrictions in turn violate -- as Appellants also specifically allege in this action -- the plain terms of the Candidate Qualifications Clause.[2]

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[2] And the fundamental principle that qualifications of federal voters and candidates are "defined and fixed" in the Constitution and

Ignoring each of the above claims in their entirety, however, the State and federal Appellees now argue that Appellants' separate Voter Qualifications claim can be defeated simply by treating identical sub-state voter residency restrictions as harmless "Times, Places, and Manner" regulations authorized by the separate Elections Clause of the U.S. Constitution. Art. I, § 4.

In view of their continuing failure even to address Appellants' independent Apportionment and Candidate Qualifications claims, however, Appellees' more limited argument regarding the proper treatment of district residency restrictions under the

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"unalterable" by Congress was re-affirmed by this Court as recently as three weeks ago. Nixon v. United States, 93 DAR 574, 577 (January 13, 1993) (citing Powell v. McCormack, 395 U.S. 486, 539 (1969)).

separate Voter Qualifications and Elections Clauses, simply lacks any persuasiveness.

In sum, Appellees' failure to address Appellants' Candidate Qualifications and Apportionment Clause claims in this case simply fatally undermines what limited analysis they eventually do offer for the Voter Qualifications claim. Accordingly, the district court's dismissal of these claims must be reversed.

3. Arithmetical Deviations in Actual Votes Cast From District to District of Approximately 600% to 700% Infringe Severely Upon All Californians' Rights to Actual Electoral Equality, or 'One Person, One Vote'; Issue Fails to Provoke Even One Comment from Appellees Here, However.

In addition to the several omissions already discussed, the Appellees also fail even to mention

Appellants' equally paramount electoral equality claim.

Appellants allege in this case that requiring California's federal electorate to select its representative congressional delegation through a districting plan producing deviations in actual votes cast from district to district as high as 600% to 700% violates the fundamental principle of "one person, one vote."

In Wesberry v. Sanders, 376 U.S. 1 (1964), this Court held, per Black, J., that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 8.

With deviations in actual votes cast

from district to district as high as 600 to 700%, however, some federal voters in California enjoy as much as six to seven times as much influence as other, identically qualified, voters in selecting California's congressional delegation. Aside from the question of whether California's new districts contain reasonably equal numbers of people, then, that they contain such vastly disparate numbers of actual federal voters simply cannot be consistent with this Court's ongoing commitment to the fundamental constitutional principle of "one person, one vote."[3]

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[3] Again, compare Judge Kozinski's opinion, concurring in part and dissenting in part, in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir.1990) (concluding that one-person, one-vote principle requires more than simple population equality even in state and local elections), cert. denied, 111 S. Ct. 681 (1991).

The district court plainly erred in summarily dismissing Appellants' electoral equality -- or "one person, one vote" -- claim in this case, and its judgment must therefore be reversed.

B. WHAT ANALYSIS IS OFFERED BY THE APPELLEES FOR THE REMAINING CLAIMS AND ISSUES SIMPLY LACKS MERIT

1. Appellees' Continued Reliance on the *Ex Parte Seibold* (1880) Case is Entirely Misplaced in View of this Court's Holding in *New York v. United States* (1992) Last Term, and Particularly in Light of the House of Representatives' Own *Repeated Admissions*, from 1844 to 1910, that Federal Districting Mandates (see 5 Stat. 491 (1842)) are Indeed Unconstitutional.

In January 1844, the Committee on Elections of the U.S. House of Representatives, per Stephen A. Douglas (D-Ill.), Chair, concluded forcefully that:

> Congress has no more authority to direct the form of State legislation, than the States have to

> dictate to Congress its rule of action.
>
> The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments.[4]

And, just last term, this Court strongly re-affirmed that:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.
>
> As an initial matter, Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [citation omitted]

New York v. United States, 112 S. Ct. 2408, 2423 & 2434 (1992).

In accordance with these plain

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[4] Relative to the Right of Members to Their Seats in the House of Representatives, H.R. Rep. No. 60, 28th Cong., 1st Sess., p. 6 (Jan. 22, 1844)

principles, Plaintiff-Appellants claim that Congress' attempt to require that congressional elections take place only through single-member districts contains the lesser-included mandate or instruction to the sovereign States that they take the affirmative political or legislative act of drawing or establishing such districts. Appellees, for their part, now rely on the case of Ex parte Seibold, 100 U.S. 371 (1880) (approving early federal civil rights laws), to oppose this straightforward claim.

The Seibold case simply has no bearing on the question presented here, however. Appellants are not alleging that 2 U.S.C. 2c is unconstitutional because it is a "partial" regulation of federal elections. They claim simply

that the federal government may not order or instruct the States to draw or establish federal election districts.[5]

State Appellees argue in this case that "Congress has exercised its power to require district election for 150 years without challenge." S.M.A., at 11 (emphasis supplied). As should already be apparent, however, this statement is itself patently false. Again, in 1844 Congress itself admitted -- in the face of direct challenge from four statewide delegations (representing New Hampshire, Georgia, Mississippi, and Missouri,

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[5] That the Seibold case has no bearing on this question is made even more plain by Congress' own actions, 20 to 30 years after that case was decided, again simply refusing to enforce its federal districting statute. See Davison v. Gilbert, H.R. Rep. No. 3000, 56th Cong., 2d Sess. (1901); Parsons v. Saunders, H.R. Rep. No. 1695, 61st Cong., 2d Sess. (1910) (Committee minority's opinion followed by full House of Representatives; Committee majority's recommendations rejected).

respectively) -- that its federal districting mandate was indeed unconstitutional.[6]

In sum, Appellees' argument in this case that the federal Congress somehow has power to order or instruct the States in their sovereign or corporate capacities to draw or establish congressional election districts is, again, simply palpably meritless. Accordingly, the district court's erroneous dismissal of Appellants' core federalism claim in this case must be

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[6] Again, see Relative to the Right of Members to Their Seats in the House of Representatives, H.R. Rep. No. 60, 28th Cong., 1st Sess. (1844).

Stating the historical record more accurately, then, until its hastily arranged return (by way of private immigration bill) in 1967 (see 81 Stat. 581), Congress' single-member districting mandate had been successfully challenged on several separate occasions, and had never once been enforced by Congress, or any court of law.

reversed.

2. Framers Did Not Intend the Words 'the Legislature' in the Elections Clause of the U.S. Constitution to Include Unelected State Judicial Bodies.

The Federal Appellee argues that the California Supreme Court is properly understood to be part of "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution. Art. I, § 4. He relies for support of this view on the Court's reasoning in the case of Smiley v. Holm, 285 U.S. 355 (1932), to the effect that those institutions which are part of the ordinary "law-making" process of a State may be considered part of "the Legislature thereof" in the Elections Clause, and claims that state courts are part of this general "law-making" process. F.M.A., at 9-10 & n. 5.

Such an expansive reading of the Smiley decision, however, overlooks what must have been the Framers' original rationale for specifying that "the Legislature[s]" of the States should govern the procedures of congressional elections in the first place.

When Charles Pinckney first proposed in the Constitutional convention that federal Representatives be elected "in such manner as the Legislatures of each State should direct" he reasoned in support of the proposal that "the Legislature could then accommodate the mode to the convenience and opinions of the people." Quoted in Relative to the Right, supra, at p. 4 (emphasis supplied). But if unelected courts are permitted to intervene in the ordinary legislative or political processes of a

State and themselves draw or establish congressional districts, it is precisely the "convenience and opinion of the people" of the States which is eliminated from the process altogether.

Districting plans developed by unelected courts are entirely divorced from the popular will, or "convenience and opinion," of the people. There is literally no way of knowing whether a majority of the people at large actually support a particular court-drawn districting plan, or, more fundamentally -- when the judiciary intervenes after the legislature has "deadlocked," (F.M.A., at 9) -- whether the people desire to establish new districts at all.

In sum, the Framers did not intend the words "the Legislature" in the Elections Clause of the U.S. Constitution

to include unelected state courts. Accordingly, the district court's summary dismissal of Appellants' claim that the California Supreme Court lacks authority to draw or establish federal election districts must also be reversed.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

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